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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JENIFER FISHER et al.,

Plaintiffs and Respondents,

v.

HOUSING AUTHORITY OF THE CITY OF FRESNO et al.,

Defendants and Appellants.

F055230

(Super. Ct. No. 08CECG00047)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo A. Corona, Judge.

McCormick, Barstow, Sheppard, Wayte & Carruth, Todd W. Baxter and Scott M. Reddie for Defendants and Appellants.

Sutton Hatmaker Law Corporation, S. Brett Sutton, Susan K. Hatmaker and Laurian C. Ewbank for Plaintiffs and Respondents.

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Defendants appeal from the denial of their special motion to strike plaintiffs' complaint pursuant to Code of Civil Procedure[1] section 425.16. We conclude the causes of action alleged in plaintiffs' complaint did not arise from any act of defendants in furtherance of their right of petition or free speech in connection with a public issue. We therefore affirm the order denying defendants' motion.

FACTUAL AND PROCEDURAL BACKGROUND

The complaint alleges that, prior to April 27, 2007, plaintiffs were employees of the Housing Authorities of the City and County of Fresno (FHA) in the information technology (IT) department. Plaintiff, Linda Murray, observed conduct that led her to believe defendant, Darrell Tuckness, executive director of FHA, was involved in an inappropriate sexual relationship with another IT department employee, Jane Pointer. In exchange for sexual favors, Pointer received favoritism and special treatment from Tuckness. Murray complained to Tuckness in April 2006. Shortly after that, she was denied a promotion. On February 27, 2007, Murray made a formal written complaint to Kathleen Paley, assistant executive director, about Tuckness' sexual harassment and his retaliation against her for her complaints about his relationship with Pointer. At that time, she reasonably and in good faith believed Tuckness' conduct was unlawful under the Fair Employment and Housing Act (FEHA). FHA perverted the investigation process and solicited negative comments about Murray rather than investigating her complaints. On March 16, 2007, Murray was placed on paid administrative leave.

Plaintiffs, David Harris and Jenifer Fisher, participated in the investigation of Murray's complaints about Tuckness' and Pointer's conduct; they gave information perceived by FHA to be favorable to Murray. Harris also filed a formal grievance, complaining about Tuckness' and Pointer's relationship and asserting that the favoritism

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1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

and special treatment were violations of the FHA non-harassment policy. He was threatened by Tuckness and others, and he filed another complaint; he was placed on administrative leave.

On April 27, 2007, plaintiffs were informed the IT department was being eliminated for economic reasons, and the IT services would be outsourced to an outside vendor, CMTi. All the employees in the IT department were placed on 90 days paid leave; they were informed that, if they were not hired by CMTi, their employment with FHA would be terminated effective July 27, 2007. Plaintiffs were not hired by CMTi. Plaintiffs allege the reasons given for elimination of the IT department and for the denial of re-employment were a pretext to make the termination of their employment appears legitimate, when in fact they were unlawfully terminated in retaliation for their complaints of sexual harassment. The fact that Fisher's position was funded by a specific grant, which was funded through January 2009 and was not part of the FHA's regular budget, indicates the budgetary reasons given by FHA for plaintiffs' termination were a pretext; their termination was motivated by their sexual harassment complaints and perceived support of Murray's complaints during the investigation.

The first cause of action alleges defendants violated the FEHA (Gov. Code, § 12940, subd. (k)) by failing to provide a workplace free of sexual harassment, failing to timely and adequately investigate their complaints of sexual harassment, retaliating against plaintiffs for their complaints, failing to take effective remedial action against the perpetrators of such sexual harassment, and failing to adopt and enforce an effective anti-sexual harassment policy. The second cause of action alleges sexual harassment in violation of the FEHA (Gov. Code, § 12940, subds. (a), (h), (i), (j)); it alleges the conduct and retaliation of defendants, including the acts and omissions alleged in the first cause of action, created a hostile, offensive, and intimidating work environment. The third cause of action alleges defendants retaliated against plaintiffs for their complaints of and opposition to inappropriate sexual behavior and unlawful sexual harassment and

discrimination by terminating their employment with FHA. The fourth cause of action alleges defendants failed to prevent retaliation, in violation of the FEHA (Gov. Code, § 12940, subds. (a), (h), (i), (k)). The fifth cause of action is entitled "Violation of Due Process; Breach of Contract." It alleges plaintiffs had a protected property interest in their employment, which could not be terminated without due process of law; FHA wrongfully terminated them without the required notice, opportunity for hearing, and good cause. The sixth cause of action is for breach of the implied covenant of good faith and fair dealing; it alleges plaintiffs' employment contracts contained such a covenant and defendants breached it by failing to protect plaintiffs from unlawful sexual harassment and discrimination, and from retaliation for participation in the investigation of Murray's complaints. The seventh and eighth causes of action allege intentional and negligent infliction of emotional distress, based on facts alleged previously. The ninth, tenth, and eleventh causes of action are alleged by Harris against FHA, and allege he was not paid for his overtime work and was not given meal and rest periods as required by statute.

Defendants filed a special motion to strike the complaint pursuant to section 425.16 (anti-SLAPP motion).[2] Plaintiffs filed opposition. The court denied the motion, finding that the conduct of defendant alleged in the complaint was not protected activity that fell within the coverage of the statute. Defendants appeal.

DISCUSSION

I. Anti-SLAPP Motion

"A SLAPP suit has been described as 'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.' [Citation.]" (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113.) **"**The Legislature enacted section 425.16 in

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[2] SLAPP is an acronym for "'strategic lawsuit against public participation.'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).)

1992 to provide a procedure by which a trial court can 'dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue.'" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 905.)

Under section 425.16, the anti-SLAPP statute, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Determining whether an action should be stricken pursuant to section 425.16 requires a two-step process. First, the court must decide whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (*Navellier, supra,* 29 Cal.4th at p. 88.) If it finds that the defendant has made the required showing, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 89.) A defendant need not show that the plaintiff actually intended by filing his action to chill the defendant's exercise of his rights of free speech and petition, or that the action had that effect. (*Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1062.)

Under the statute, the court may strike individual causes of action. (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1124.) It may not strike individual allegations within a cause of action, however. (*Ibid.*) Consequently, "'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is

"merely incidental" to the unprotected conduct.' [Citations.]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hamptom LLP* (2005) 133 Cal.App.4th 658, 672.)

The trial court found that the causes of action in plaintiffs' complaint did not arise from acts of defendants in furtherance of their right of petition or free speech; it found any protected activity of defendants was merely incidental to plaintiffs' claims. Consequently, it denied defendants' anti-SLAPP motion without reaching the second step of the analysis.

II. Standard of Review

An order denying an anti-SLAPP motion is appealable. (§ 425.16, subd. (i).) The ruling on the motion is subject to independent review, both as to whether the defendant made a threshold showing that the cause of action triggers the anti-SLAPP statute, and as to whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Olaes v. Nationwide Mutual Ins. Co*. (2006) 135 Cal.App.4th 1501, 1504.)

III. Defendants' Threshold Showing

Under section 425.16, the initial burden is on the defendant to make a prima facie showing that the challenged cause of action against the defendant is one "arising from any act of [defendant] in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

> "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the

> constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Defendants contend plaintiffs' allegations fall within subdivisions (e)(1) and (e)(2) of section 425.16 because defendants' "grievance investigation and decision to outsource were 'official proceedings' authorized by law." Even assuming arguendo defendant's grievance investigation and the proceeding at which FHA decided to outsource the IT services were "official proceeding[s] authorized by law," defendants must also show that plaintiffs' causes of action arose out of "any written or oral statement or writing" made before those proceedings or made in connection with an issue under consideration or review by those proceedings.

"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning.… 'Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights.' [Citation.]" (*Navellier, supra,* 29 Cal.4th at pp. 92-93.)

Thus, the question we must address is whether the activity of defendants from which plaintiffs' complaint arose constitutes an act in furtherance of defendants' right of petition or free speech, as that phrase is defined in section 425.16.

"[T]he statutory phrase 'cause of action ... arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of

action is *based on* the defendant's protected free speech or petitioning activity. [Citations.]" (*Navellier, supra*, 29 Cal.4th at p. 89.) The court in *Cotati* rejected any suggestion that "arising from" means "in response to." Thus, where the plaintiff filed an action against the defendant in state court after the defendant filed an action against the plaintiff in federal court, the plaintiff's action may have been filed after and in response to the federal court action, but it did not arise from the defendant's exercise of his right of petition by filing the federal court action. Rather, both actions arose from the same underlying controversy. (*Id*. at p. 80.)

In *Gallimore v. State Farm Fire & Casualty Ins. Co*. (2002) 102 Cal.App.4th 1388, plaintiff sued an insurer for unfair business practices, asserting the insurer mishandled claims filed against it. The allegations of the complaint were based in part on information the insurer provided to the Department of Insurance (DOI) in response to a DOI investigation. (*Id*. at p. 1391.) The insurer filed an anti-SLAPP motion, asserting the action was based on its protected communications with the DOI. The court concluded the anti-SLAPP statute did not apply. Although reports to the DOI may have triggered plaintiff's action, the action did not arise from the reports or from any communication by defendant to the DOI. (*Id*. at p. 1398.) The complaint alleged the defendant violated various statutes and regulatory rules in its claims handling; it did not seek recovery for the defendant's activity in communicating information to the DOI or allege that any such communication was wrongful or the cause of any injury to the plaintiff. (*Id*. at p. 1399.) The court concluded:

> "[T]he alleged wrongful acts of State Farm were not done in furtherance of any claimed right of petition or free speech. Indeed, State Farm does not really claim otherwise. It argues instead that plaintiff is alleging that State Farm's communications to DOI (which allegedly contain or constitute *evidence* of such wrongdoing) were protected communications, and to allow plaintiff to rely on them to prosecute this action would effectively interfere with State Farm's right to freely communicate with its regulatory agency. We reject this argument out of hand. This contention confuses

> State Farm's allegedly *wrongful acts* with the *evidence* that plaintiff will need to prove such misconduct. Plaintiff seeks no relief from State Farm for its communicative acts, but rather for its alleged mistreatment of policyholders and its related violations and evasions of statutory and regulatory mandates. Even State Farm does not argue that such activity would be protected as an exercise of a right of petition or free speech." (*Gallimore, supra*, 102 Cal.App.4th at p. 1399.)

In *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273 (*Alta Loma*), in accordance with applicable rent control laws, defendant served notices on all the tenants in its apartment building that it would remove its building from the rental market in 120 days and they would be required to vacate the premises within that time. The rent control laws required defendant to allow a disabled tenant one year within which to find a new residence. One tenant, Marie Mangine, notified defendant she was disabled and requested the extended period to vacate. Defendant asked for more details concerning her disability, in order to determine whether she met the statutory definition. Mangine did not provide the requested details, and, after the 120-day period had expired, defendant initiated unlawful detainer proceedings to evict her. After her eviction, the Department of Fair Employment and Housing (DFEH) filed suit against defendant for disability discrimination; defendant responded with an anti-SLAPP motion. The court affirmed the denial of the motion.

The court concluded defendant had not shown the acts alleged in the DFEH complaint arose from defendant's protected activity. Defendant contended the complaint was based on its communications and actions in the rent control proceeding, an administrative proceeding authorized by law, and its petitioning activity of filing the unlawful detainer action in the trial court. (*Alta Loma, supra*, 154 Cal.App.4th at p. 1283.) The court assumed defendant's "acts of filing and serving notices of its intent to remove its residential units from the rental market, its investigation and communications made necessary by the rent control removal process, and its filing and prosecuting its unlawful detainer actions against Mangine constituted protected petitioning or free

speech activity." (*Ibid*.) The gravamen of DFEH's complaint, however, was not the communications or evictions, but defendant's alleged acts of failing to recognize and accommodate Mangine's disability. The communications and the filing of the unlawful detainer action may have triggered the DFEH suit and supplied evidence of the alleged disability discrimination, but they were not the basis of the DFEH complaint.

We agree with the trial court that plaintiffs' causes of action did not arise out of defendants' acts in furtherance of their rights of petition or free speech in connection with a public issue. Initially, we note that defendants' motion to strike was properly denied as to the tenth, eleventh, and twelfth causes of action, which contain claims by Harris for unpaid wages. Those causes of action allege Harris was not paid the wages to which he was entitled by law. Defendants have not asserted or shown that the claims for unpaid wages involved any communications before or in connection with an official proceeding, or in any way implicated their right of free speech or petition in connection with such a proceeding.

The remaining causes of action in plaintiffs' complaint are premised on allegations Murray and Harris complained about perceived sexual harassment and a hostile work environment, FHA investigated Murray's complaints, Harris and Fisher participated in the investigation and provided information FHA perceived to be favorable to Murray, defendants retaliated against plaintiffs for their complaints and support of the complaints by denying Murray a promotion, placing Murray and Harris on administrative leave, and terminating the employment of all three plaintiffs, ostensibly as a budget cutting measure. The primary activity of defendants alleged as the basis of plaintiffs' causes of action is the wrongful termination of plaintiffs' employment, without good cause and in retaliation for plaintiffs' exercise of their rights under the FEHA. Other activities alleged include sexual harassment in the form of favoritism and special treatment for the employee with whom Tuckness was having an illicit affair, defendants' failure to prevent this sexual

harassment in the workplace, which created a hostile work environment, and retaliation against plaintiffs for complaining about it.

Thus, the gravamen of plaintiffs' complaint is that defendants retaliated against plaintiffs for their complaints about perceived sexual harassment, ultimately by terminating their employment. Plaintiffs' causes of action arise from alleged sexual harassment, retaliation, and wrongful termination. They do not arise out of written or oral statements or writings of defendants made before, or in connection with an issue under consideration or review by, an official proceeding authorized by law.

Defendants contend plaintiffs' causes of action arose from defendants' investigation of plaintiffs' complaints of sexual harassment and defendants' decision to eliminate the IT department and outsource its services, which defendants contend are either official proceedings or protected speech or petition activity. Defendants rely on *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600 (*Gallanis-Politis*), for the proposition that an investigation conducted by a defendant in connection with a plaintiff's complaints constitutes that defendant's protected free speech and petition activity. In *Gallanis-Politis,* a county employee sued the county for discrimination and later amended to add a retaliation claim against two of its supervisory employees. The plaintiff alleged the supervisors obstructed her efforts to obtain bilingual bonus pay by conducting a pretextual investigation and preparing a report falsely concluding she was not entitled to bilingual pay. The two supervisors filed an anti-SLAPP motion. The evidence presented with the motion indicated the investigation was conducted in order to answer questions from the county's attorneys, to enable them to respond to the plaintiff's discovery requests.

The court concluded the investigation and report were the acts on which the plaintiff's retaliation cause of action against the supervisors was based. (*Gallanis-Politis, supra,* 152 Cal.App.4th at p. 611.) They were not merely incidental to a cause of action based essentially on nonprotected activity; rather, they were at the heart of her retaliation

claim against the supervisors, and the allegations of nonprotected activity were merely incidental to the protected conduct. (*Id.* at p. 614.) Because the investigation was conducted and the report was written in response to a request for information from counsel for use in the litigation, they were acts in furtherance of the supervisors' right of petition or free speech, because they were "'written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by a … judicial body.'" (*Id*. at p. 612.) The plaintiff's retaliation cause of action was subject to the anti-SLAPP statute. (*Id*. at pp. 615, 619.)

Gallanis-Politis did not hold that every investigation of an employee's complaints of discrimination or other wrongful conduct carried out by an employer constitutes protected activity or an official proceeding for purposes of the anti-SLAPP statute. In *Gallanis-Politis*, the investigation was a protected activity because it was conducted in response to a discovery request made in the course of a judicial proceeding - the litigation commenced by the plaintiff against the county. The plaintiff's cause of action against the supervisors was subject to the anti-SLAPP statute because the investigation and the report were themselves the basis of the plaintiff's retaliation cause of action against the supervisors; the plaintiff alleged the supervisors retaliated against her by conducting a pretextual investigation and preparing a false report.

Defendants' investigation of Murray's harassment complaint was not conducted in connection with any judicial proceeding. Even if the investigation itself constituted an official proceeding, as defendants contend, plaintiffs' causes of action are not based on defendants' written or oral statements or writings made in connection with that proceeding. Regarding defendants' investigation of Murray's complaints, the complaint alleges only that "FHA perverted the investigation process and solicited negative comments about MURRAY rather than looking into her complaints." That single isolated allegation is not the "principal thrust or gravamen" of plaintiffs' claims. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.)

The only other mention of the investigation in the complaint is in the allegations that Harris and Fisher participated in the investigation and made statements FHA perceived to be favorable to Murray, which plaintiffs allege was one of the reasons for defendants' retaliation against Harris and Fisher. Those allegations are not based on any oral or written statements of *defendants* and do not implicate *defendants'* rights of free speech and petition. Rather, they assert plaintiffs' exercise of their own rights of free speech and petition, and defendants' retaliatory response.

The conduct of the investigation does not form the basis of plaintiffs' causes of action; at most, it merely explains or provides evidence of defendants' motive for retaliating against Harris and Fisher. It is defendants' acts of retaliation and harassment from which plaintiffs' causes of action arise. The trial court properly concluded that the allegations concerning defendants' investigation of Murray's claims are merely incidental to the claims of retaliation and wrongful termination.

Defendants also contend plaintiffs' claims are based on FHA's decision to outsource the IT services and eliminate the IT department. That decision, however, was not a written or oral statement or writing made before an official proceeding or made in connection with an issue under consideration or review by an official proceeding authorized by law.

In *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343 (*San Ramon*)**,** a fire district sought mandamus relief after a county retirement board decided to increase contributions payable by the fire district and its employees. The board had made its decision by majority vote of its members after presentation and discussion at a public hearing. The board responded to the district's petition with an anti-SLAPP motion, which the trial court denied. On appeal, the board argued the anti-SLAPP motion should have been granted "because the District's petition arose from the Board members' discussions and votes in a public proceeding, which were acts in furtherance of their constitutionally

protected right to free speech." (*Id*. at p. 353.) The court noted that a public official or government entity may make an anti-SLAPP motion in an appropriate case. It suggested there was "support for the argument that the protection accorded by the anti-SLAPP statute extends to statements made by public officials at an official public meeting, and perhaps also to their votes." (*Ibid*.) The court concluded, however, that "there is nothing about the Board's collective action in requiring the District to make additional contributions to the [retirement system] in the amount specified by the Board's actuary that implicates the rights of free speech or petition." (*Ibid*.) The court explained:

> "[T]he Board was not sued based on the content of speech it has promulgated or supported, nor on its exercise of a right to petition. The action challenged consists of charging the District more for certain pension contributions than the District believes is appropriate. This is not governmental action which is speech-related. By contrast, if the action taken by the Board had been to authorize participation in a campaign to amend state pension laws, or to become actively involved in a voter initiative seeking such changes, then the Board's own exercise of free speech might be implicated. But this is not the case, and this distinguishing feature is dispositive of the Board's argument." (*San Ramon, supra*, 125 Cal.App.4th at p. 357.)

The court affirmed the denial of the board's anti-SLAPP motion. (*San Ramon, supra*, 125 Cal.App.4th at p. 359.)

Plaintiffs are not suing any individual board member based on statements made during discussions of outsourcing the IT services or based on how the member voted on that issue. Rather, plaintiffs are suing FHA which, as a governmental entity, made the decision to outsource the IT services, eliminate the IT department, and terminate plaintiffs' employment. FHA "was not sued based on the content of speech it has promulgated or supported, nor on its exercise of a right to petition." (*San Ramon, supra*, 125 Cal.App.4th at p. 353.) As in *San Ramon*, "there is nothing about the Board's collective action in [eliminating the IT department and terminating plaintiffs' employment] that implicates the rights of free speech or petition." (*Ibid*.) Defendants

were sued for wrongfully terminating plaintiffs' employment in retaliation for plaintiffs' exercise of their right to complain of perceived unlawful sexual harassment, while maintaining a pretext that plaintiffs' termination was part of an economic decision to eliminate the entire department and replace it with an outside contractor. The facts surrounding the outsourcing of the IT services and the elimination of the IT department may be offered as evidence that FHA's claimed reason for terminating plaintiffs was a mere pretext. Board members' oral or written statements made or votes cast in connection with the decision to outsource the IT services, however, are not the activities that gave rise to plaintiffs' causes of action.

We find no error in the trial court's determination that plaintiffs' causes of action against defendants did not arise from any act of defendants in furtherance of their right of petition or free speech in connection with a public issue. Accordingly, defendants' motion to strike the complaint pursuant to section 425.16 was properly denied.

IV. Plaintiffs' Showing

Because defendants did not meet their burden of showing that the challenged causes of action arose from their protected activity, we need not, and do not, reach the question whether plaintiffs demonstrated a probability of prevailing on the claim.

V. Attorney's Fees

In their respondents' brief, plaintiffs assert this court should award them attorney's fees for opposing defendants' frivolous motion. Under section 425.16, subdivision (c), "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." Plaintiffs requested an award of attorney's fees in their opposition to defendants' anti-SLAPP motion. The trial court denied that request, implicitly finding that the motion was not frivolous. Plaintiffs did not appeal the denial of that request. Consequently, the issue is not properly before this court.

"'A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise.' [Citation.]" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) Section 425.16, subdivision (c), authorizes an award of attorney fees to a plaintiff who successfully resists an anti-SLAPP motion, if the court finds the motion was frivolous or solely intended to cause unnecessary delay. It does not preclude recovery of appellate attorney fees by a prevailing plaintiff. To the extent plaintiffs are requesting an award of attorney's fees on appeal pursuant to section 425.16, subdivision (c), we agree with the trial court that plaintiffs have not demonstrated defendants' motion was "totally and completely without merit," that is, that "'any reasonable attorney would agree such motion is totally devoid of merit.' [Citation.]" (§ 128.5, subd. (b)(2); *Decker v. U.D. Registry, Inc*. (2003) 105 Cal.App.4th 1382, 1392.) Accordingly, we decline to award plaintiffs their attorney's fees incurred in this appeal.

DISPOSITION

The order denying defendants' anti-SLAPP motion is affirmed. Plaintiffs are awarded their costs on appeal.

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HILL, J.

WE CONCUR:

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CORNELL, Acting P.J.

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KANE, J.